United States Can Company, a wholly owned subsidiary of Inter-American Packaging, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 13–CA–27510

January 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On August 16, 1990, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed cross-exceptions and supporting briefs. The General Counsel and Charging Party filed answering briefs to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's and Charging Party's cross-exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the judge's recommended Order as modified.

We agree with the judge that the Respondent, on its acquisition of the four plants that comprised the general packaging division of Continental Can Company, adopted its predecessor's collective-bargaining agreement. In addition to the reasons set forth by the judge, we rely on the letters dated May 14, 1987,[3] that the Respondent's vice president, Barry Brock, mailed to each local union president at the four plants. In those letters Brock announced the completed acquisition of the general packaging plants and invited each local union president to meet and negotiate a new collective-bargaining agreement between the Respondent and each local union. The Respondent also stated in the letters that ''[i]n the interim, the terms and conditions including wages, benefits and working conditions as they presently exist under the collective bargaining agreement with the Continental Can Company shall remain in effect.''

The meaning of this sentence is ambiguous and susceptible to several interpretations. The Respondent may have intended by this sentence to inform the Union that it would maintain existing terms and conditions of employment that it was required under *Burns*[4] to maintain until a new agreement or impasse was reached. But the sentence is equally susceptible to an interpretation that the Respondent was expressly adopting its predecessor's contract in toto. Given this ambiguity from the very outset of the Respondent's communications with the Union, an examination of the Respondent's subsequent conduct becomes necessary. We agree with the judge, for the reasons set forth by her, that the Respondent by its conduct adopted and became bound to its predecessor's contract.[5] In this regard, we note particularly that the Respondent honored the union-security and checkoff provisions of the predecessor's contract. These are matters which are dependent on the existence of a current contract.[6] In addition, the Respondent relied on the management-rights provision of the predecessor's contract, a provision that ordinarily ceases to have effect if the contract no longer exists.[7] Finally, the Respondent's actions in this respect continued for the duration of the contract, thereby indicating an intention to be bound for the duration of the contract or at least an intention to be bound until a new contract was reached.

[1] Thereafter, the Respondent filed a motion for leave to file limited response to answering brief of Charging Party, and the Charging Party filed a motion to strike portions of the Respondent's answering brief. In addition, the Charging Party submitted a motion to file a supplemental memorandum regarding the effect, on the 10(b) issue in this case, of a lawsuit filed by the Charging Party seeking to enjoin the Respondent's acquisition of the general packaging division of Continental Can Company.

We deny the Charging Party's motion to strike portions of the Respondent's answering brief, but we grant the remaining motions and accept the supplemental documents filed by the parties. In light of our findings, however, we find it unnecessary to pass on the merits of the parties' contentions raised in the supplemental documents.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were taken to the judge's finding that a unit of the four plants acquired by the Respondent from Continental Can Company remained appropriate after their acquisition by the Respondent and that the Respondent violated Sec. 8(a)(5) by refusing to bargain with the Union on a multiplant basis on and after August 20, 1987.

The General Counsel and Charging Party except to the judge's failure to include the office and plant clerical employees at the consolidated Clearing and North Grand plants in the unit description set forth by the judge in her conclusions of law. We find merit in this exception. In accordance with par. VI of the first amended complaint, we correct the unit description to include the office and plant clerical employees at the Clearing/North Grand plants.

[3] All dates are in 1987 unless otherwise indicated.

[4] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). As noted by the judge, where, as here, the Respondent made it ''perfectly clear'' in its May 14 letters that it was retaining all of Continental's employees, its obligation under *Burns* included not only the duty to recognize and bargain with the Union, but also to ''consult with the employees' bargaining representative before [fixing initial] terms'' of employment. Id. at 294–295. In the absence of such consultation, the Respondent's obligation was to continue in effect those terms and conditions of employment which the unit employees enjoyed under Continental's operations.

[5] Accordingly, like the judge, we find it unnecessary to pass on whether the Respondent became bound to the contract under a stock transfer theory.

[6] *S-H Food Service*, 199 NLRB 95 fn. 2 (1972).

[7] *Holiday Inn of Victorville*, 284 NLRB 916 (1987).

Having found that the Respondent was bound to the predecessor contract, it follows that the Respondent's unilateral discontinuance of the Interplant Job Opportunity Program (IPJO), a contractually established term and condition of employment, was clearly unlawful.[8] Contrary to the Respondent, we do not find that the amended charge filed by the Union in October 1988 alleging the IPJO violation is time-barred by Section 10(b) of the Act. We agree with the judge that the allegations in the October 1988 charge and the timely filed January 1988 charge are closely related within the meaning of *Redd-I, Inc.*, 290 NLRB 1115 (1988). See also *Concord Metal*, 295 NLRB 742 fn. 2 (1989).[9] Therefore, we reject the Respondent's argument that the complaint allegations based on the October 1988 charge should be dismissed.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United States Can Company, a wholly owned subsidiary of Inter-American Packaging, Inc. Oak Brook, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Rescind the unilateral discontinuance of IPJO, take actions consistent with the terms set forth in article 29 of the 1986–1989 Master Agreement to apply that program to eligible applicants, and make the unit employees whole for any losses they may have suffered because of the Respondent's discontinuance of IPJO, with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).''

2. Substitute the attached notice for that of the administrative law judge.

[8] The judge mistakenly found that the Respondent first repudiated the IPJO in December at the Clearing plant rather than in September at the Burns Harbor plant. This error does not affect the outcome of our decision.

We reject the Respondent's argument that the discontinuance of the IPJO occurred on May 26. Although the Respondent told the Union on that date that it would not adhere to the IPJO, that statement was in the context of its contemporaneous statement that it would not adhere to the contract. As discussed above, the Respondent's statement as to the contract was belied by its subsequent conduct. It was not clear until September that the Respondent *in fact* would not adhere to the IPJO.

[9] Accordingly, we find it unnecessary to decide whether the October 1988 charge was timely under the Board's decisions in *Farmingdale Iron Works*, 249 NLRB 98 (1980), and *A & L Underground*, 302 NLRB 467 (1991).

[10] The Charging Party excepts to the judge's failure to provide in her recommended Order a provision requiring the Respondent to make whole any employee for losses attributable to its unlawful discontinuance of IPJO. We find merit in this exception, and we shall modify the recommended Order accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the United Steelworkers of America, AFL–CIO–CLC in an appropriate multiplant unit comprised of employees represented by the Union and its Locals at our plants in Derry, New Hampshire, Burns Harbor, Indiana, Passaic, New Jersey, and Chicago, Illinois.

WE WILL NOT unilaterally alter terms and conditions of employment by refusing to recognize and bargain with the Union as the collective-bargaining representative of employees in an appropriate multiplant unit or by unilaterally discontinuing the Interplant Job Opportunity Program.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain collectively with the United Steelworkers with respect to rates of pay, wages, hours of work, and other terms and conditions of employment for employees represented by the Union and its Locals in the multiplant unit described above, and embody any understanding which may be reached in a signed collective-bargaining agreement.

WE WILL restore the Interplant Job Opportunity Program in accordance with article 29 of the 1986–1989 Master Agreement, and take necessary actions to make that program available to eligible ''IPJO'' applicants and WE WILL make unit employees whole for any loss of earnings they may have suffered as a result of our unlawful discontinuance of IPJO, with interest.

UNITED STATES CAN COMPANY, A WHOLLY OWNED SUBSIDIARY OF INTER-AMERICAN PACKAGING, INC.

Linda McCormick, Esq., for the General Counsel.
Rody P. Biggert, Esq. and *Condon A. McGlothlen, Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for the Respondent.
Richard J. Brean, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Unfair labor practice charges were filed in this matter by the United Steelworkers of America, AFL–CIO–CLC (the Union), on January 20, 1988, and amended on January 27 and October 4.

Thereafter, a complaint issued on April 29, as amended on June 21 and December 2, alleging that the Respondent, United States Can Company (US Can or Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by insisting on bargaining on a single plant basis with each of four plants which prior to their acquisition, were part of a multiplant unit covered by a master collective-bargaining agreement and by unilaterally altering terms and conditions of employment.

This case was tried before me on February 13 through 15, 1990, in Chicago, Illinois, at which times the parties had full opportunity to examine witnesses, introduce documentary proof, and argue orally. Taking the witnesses' demeanor into account, and upon the entire record, including able posttrial briefs submitted by the parties,[1] pursuant to Section 10(c) of the Act, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

At all times material, Respondent, a corporation with an office and place of business in Oak Brook, Illinois, has operated plants for manufacturing metal containers at various locations within and outside the State of Illinois. During the past calendar or fisal year, a representative period, in the course and conduct of its business operations, Respondent sold and shipped from its various plants within the State of Illinois products, goods, and materials valued in excess of $50,000 directly to points outside the State. Accordingly, the complaint alleges, Respondent admits, and I find that US Can is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is now and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

Issues

Through a series of complicated transactions, Respondent, US Can, ultimately acquired nine plants which originally were part of the General Packaging Division of Continental Can Company. Employees in four of these plants were represented by the Steelworkers and covered by a master labor agreement. Considering itself a successor, Respondent agreed to abide by all of the economic and some noneconomic terms of the master agreement. However, Respondent insisted it was not bound by its predecessor's contract nor obliged to bargain on a multiplant basis.

Given these bare facts, the pleadings in this case pose the following overarching questions

> (1) whether Respondent is bound to the Master Agreement and thereby required to bargain on a a mutlti-plant basis either because (a) adopted the Master Agreement through a course of conduct; or (b) purchased the four plants through a stock transfer so that it continued as the same legal entity.
>
> (2) Whether or not Respondent was bound to the Master Agreement, was it obliged to bargain on a multiplant basis under the teachings of *White-Westinghouse Corporation*, 229 NLRB 667 (1977).[2]
>
> (3) Whether Respondent unlawfully discontinued an ''Inter-Plant Job Opportunities'' program (IPJO) without notice to or bargaining with the Union.
>
> (4) Whether the unfair labor practices alleged in the complaint are time- barred by Section 10(b) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Acquisition of Continental's General Packaging Division*

1. Background facts

Continental Can Company, Inc. (Continental) manufactures containers for various uses at facilities throughout the world.[3] For a number of decades, Continental's production and maintenance employees (and some clerical workers) in 40 units at various plants across the United States were represented by the Union and covered by a series of multiplant, master collective-bargaining agreements, the most recent of which was effective from March 4, 1986, to February 19, 1989. Among the 40-bargaining units covered by the master agreement were the 4 involved in this proceeding located at Burns Harbor, Indiana; Derry, New Hampshire; Passaic, New Jersey; and Clearing/North Grand (Chicago), Illinois. Employees at the Clearing/North Grand and Passaic locations have been included in the bargaining unit since 1956; those at Burns Harbor were added in 1975 and those at Derry in 1985.[4]

2. Continental's contribution transaction

In 1986, Continental decided to sell its general packaging division which was operating at a loss of approximately $1 million a month. To facilitate the sale, Continental transferred all assets and liabilities of its general packaging facilities (excluding obligations relating to relevant collective-bargaining agreements) to a wholly owned subsidiary known as CCC Series 200, Inc. (Series 200). In return, Continental received all of Series 200's common stock.[5] On January l, 1987,[6] Continental also transferred to Series 200 all relevant collective-bargaining agreements including the master agreement at issue. At the same time, Series 200 transferred to Continental all pension liability for employees who retired from Series 200 prior to January 1, 1987. Continental admittedly engaged in these business manuevres, known as the ''Contribution Transaction'' in order to minimize the tax liability it would have incurred had it sold the general packaging division assets directly.

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[1] On May 18, 1989, Respondent filed a Motion for Summary Judgment which the General Counsel and the Charging opposed. The Board denied the Motion on October 5, 1989. Because the Board did not deny Respondent's motion with prejudice, I have considered these pretrial pleadings in resolving Respondent's argument that the Union's charge was untimely filed pursuant to Sec. 10(b) of the Act.

[2] Enfd. 604 F.2d 689 (D.C. Cir. 1979).

[3] Generally speaking, the container industry product lines fall into three major groupings: beer and beverage; food and general packaging.

[4] The Clearing and North Grand plants, both located in Chicago, were consolidated with two seperate units operating out of one building prior to its closure in early 1989. The Passaic plant was closed in late 1988.

[5] CCC Series 200 was incorporated in 1985 as a wholly owned shell corporation for indefinite use.

[6] Unless otherwise noted, all events occurred in 1987.

The transfer of Continental's general packaging division to Series 200 in no way affected the operations of the plants involved. As the parties stipulated, ''Subsequent to the Contribution Transaction, day-to-day operations at the plants continued unchanged until May 13, and Continental continued to perform all administrative functions for the business.'' Indeed, the Union never was informed of the Contribution Transaction and was unaware of Series 200's existence.

3. Acquisition agreement

In the fall of 1986, US Can, a wholly owned subsidiary of the Inter-American Packaging Co. (IAP), surfaced as a potential purchaser of Continental's general packaging plants which included in addition to the four plants involved in this proceeding, two plants whose bargaining unit employees were represented by the International Association of Machinists and another two plants which were not organized.[7] Prior to the sale, Respondent owned five other general packaging plants.[8]

As negotiations between Continental and Respondent progressed, both parties took certain steps to ensure that the sale would take the form of a stock transfer in order to protect their respective financial interests. Toward this end, Series 200 recapitalized, replacing Continental's old common stock with 500 new shares and awarding it 2000 shares of preferred stock. In addition, Series 200 declared a $10 million dividend which it paid by issuing a note for that amount to Continental.

At the same time, US Can's parent, Inter-American Packing (IAP), formed a wholly owned corporation, GP Acquisition Company, Inc. (GP), whose officers also held office in US Can. GP would become the legal entity which initially purchased Series 200.

Thereafter, on May 13, Continental and Series-200 executed an acquisition agreement with IAP, GP, and US Can which provided that on that date, closing date, GP acquire all of Series 200's common stock from Continental for $100. The acquisition agreement further provided that on an unspecified future date, the parties would file a certificate of merger and incorporation with the Secretary of the State of Delaware. US Can then would merge into Series 200 with Series 200 being the surviving corporation. Immediately thereafter, Series 200 would change its name to US Can. At that juncture, Continental would be paid $55 million in preferred stock and $10 million in the form of a note as the balance of the consideration owed for the general packaging plants.

Concurrent with the execution of the acquisition agreement, the officers of Series 200, all of whom were officers of CCC, resigned and were replaced by GP's officers, all of whom also were officers of US Can. From that day forward, Respondent considered itself the owner of the newly acquired plants, although as a legal matter, GP was the corporate entity which absorbed the Continental operations.

Respondent's witnesses explained that although the acquisition agreement resulted in the transfer of assets, the sale was structured as a stock transfer because such an arrangment coveyed significant economic advantages to both Continental and US Can. As noted previously, Continental harvested enormous tax advantages it would not have obtained had it structured the sale as an outright sale of assets. Indeed, Respondent's vice president, James Healy, who was intimately involved in the acquisition, commented that Continental went through ''some tax girations'' (sic), but by so doing, saved ''many millions of dollars.''

US Can benefited from the stock transfer acquisition as well. Continental's need to structure the transaction as a stock transfer reduced the purchase price. Further, with GP serving as the literal owner, Respondent was able to engineer the deal at a time when its own hands were tied by financial constraints. Specifically, at the time that Continental and Respondent were negotiating for the acquisition of the General Packaging Division, US Can was precluded from incurring additional debt by virtue of restrictive covenants imposed by its banking syndicate, Ameritrust. If Respondent had purchased the General Packaging Division directly, it would have acquired not only the assets of Series 200, but millions of dollars in losses as well; losses which would have been treated as debt. This would have constituted a technical default on its banking commitments, a result Respondent wished to avoid since at that same time, it was attempting to refinance its entire business with the help of a new banking group. Therefore, the formation of GP as a separate corporation with the power to acquire the General Packaging Division from Series 200 without limitations on its indebtedness, freed Respondent of concern about exceeding its debt ceiling or jeopardizing its refinancing strategies.

4. Merger of Series 200 with US Can and completion of the aquisition

Pursuant to the terms of the acquisition agreement, a certificate of merger of US Can into Series 200 and certificate of incorporation of the surviving corporation were filed with the State of Delaware on September 25. Immediately thereafter, the survivor, Series 200, was renamed US Can, the Respondent. At the same time, GP merged into IAP and ceased to exist.

The 5-month hiatus between the May 13 stock purchase closing date and the merger was due to Respondent's efforts to refinance its entire operation; efforts which did not culminate until September 25. On that date, Respondent succeeded in replacing Ameritrust with a new banking group which relieved it of the debt ceiling imposed by Ameritrust and permitted it to recapitalize. Consequently, Respondent was able to transfer to Continental preferred stock valued at $55 million and redeem the $10 million note.[9]

Thus, it was not until September 25 that this elaborate financial undertaking came to fruition. On that date, referred to as the ''Effective Date'' in the acquisition agreement,[10] Respondent transferred to Continental the greater part of the promised consideration for the purchase, and thereby perfected the transaction.[11] Once the merger was accomplished,

[7] Two other plants in Continental's General Packaging Division were not included in the sale.

[8] Production and maintenance employees at three of the plants already owned by Respondent in Elgin, Illinois, Hubbard, Ohio, and Tallapoosa, Georgia, were represented by the Steelworkers and covered by individual collective-bargaining agreements.

[9] In fact, this note was canceled since Series 200 suffered capital losses which exceeded the amount of the note.

[10] See G.C. Exh. 19 at 4, § 1.02.

[11] The acquisition agreement bestowed on Continental the right to terminate the acquisition agreement or to repurchase GP common

Respondent emerged as the independent corporate entity which owned the Clearing/North Grand, Derry, Burns Harbor, and Passaic plants.

B. *Union's Knowledge of the Acquisition and its Bargaining Relationship with Respondent*

In late 1986, David Stulman, Continental's director of labor relations, informed Leon Lynch, the Union's International vice president and chairman of its container industry conference, that Continental and US Can were negotiating with regard to the General Packaging Division. Initially, Stulman told Lynch that Continental was interested in pruchasing US Can. Shortly thereafter, he informed Lynch that the two companies might engage in a joint venture.

On March 18, 1987, Stulman and Continental's president, Richard Hoffman, met with Lynch and another union representative to outline the current state of the negotiations. At this time, Hoffman explained that Continental was close to a deal to sell the Clearing/North Grand, Passaic, Derry, and Burns Harbor plants to US Can in exchange for preferred stock, with a right to respossess the plants if dividends were not paid properly. Expressing concern that negotiated benefits for union members remain intact, Lynch asked the Continental official to urge US Can officials to accept the master agreement, and requested a copy of the sales agreement once the deal was consummated.

During a telephone call the following month, Lynch suggested that Stulman arrange a meeting between the Union and US Can. When Stulman indicated that US Can officials did not wish to meet with the Union until the deal was concluded, Lynch chose to send an identical letter dated April 27 to both companies. At the outset Lynch wrote that he understood Continental and US Can had reached a definitive contract for the sale of the General Packaging Division, subject to financing arrangements. He then asked whether US Can would recognize the Union, retain or hire all former Continental employees, and adopt the master agreement.

B. C. Brock, Respondent's vice president for human resources, responded by letter of May 1, stating that because negotiations were at a critical juncture, a definitive response would be inappropriate. He added that if the transaction was concluded successfully, US Can ''will enter into discussions with the appropriate local bargaining committee.'' (G.C. Exh. 23.) In a response dated May 11, Stulman wrote that he did not believe US Can would adopt the master agreement. He further explained that Continental would continue to be responsible for pension payments for employees who retired up to the date of the sale, after which US Can would establish an identical plan.

Although Stulman had advised Lynch that the agreement was confidential, he nevertheless mailed him an anonymous draft copy (minus appendices and disclosure statement) in mid-May. The cover of the 155 page draft was dated May 11 and titled ''Acquisition Agreement'' among Continental, CCC Class 200 Inc., Inter-American Packaging, Inc., GP Holding Company, and US Can. A handwritten note on the cover stated ''Timing on bank's consent.'' (G.C. Exh. 18.) At this point, the Union was unaware that Continental had conveyed the master agreement to Series 200. Lynch briefly reviewed the document and then forwarded it to the Union's legal department.

As outlined above on May 13, 1987, GP (renamed Series 200) assumed control of the former Continental plants. By letter of May 14, Brock wrote to each local union president at the four plants involved (with a copy to Lynch) announcing that US Can had acquired Continental's General Packaging Division, and inviting them to negotiate a new collective-bargaining agreement with the Respondent.

On receiving copies of these letters, Lynch telephoned Brock, advised him that negotiations should be with the International Union as the authorized collective-bargaining representative of the various units, and proposed a meeting for May 26 in Chicago. As agreed, on that date, Brock and Respondent's counsel, Rody Biggert, met with Lynch who was accompanied by the locals' presidents, union counsel, Joy Delaney, and others. Lynch began by welcoming US Can ''to the family of the United Steelworkes,'' stating that ''We are pleased to have you succeed Continental.'' (G.C. Exh. 45 at 1.) Brock then explained that US Can had signed an agreement to purchase the General Packaging Division effective May 13, and that although the Company would recognize the Union and bargain on a plant-by-plant basis, it would not assume the master agreement. He next distributed an 11-page segment of the final acquisition agreement titled, ''Employees,'' and read section 6:03 aloud. It provided that

> The Surviving Corporation, as a successor employer, shall recognize and bargain on a plant-by-plant basis with the unions that represent Employees at any plant bargaining unit covered by this Agreement. The Surviing Corporation shall offer employment to all Employees covered by the Collective Bargaining Agreements.
>
> The Surviving Corporation does not agree to accept the terms of any master labor agreement. However, the Surviving Corporation shall provide the economic benefit levels presently in effect under the Collective Bargaining Agreements for their term including, but not limited to, the following benefits: Wages and Salaries; Overtime; Holidays; Vacation and Expanded Employment Opportunities; Insurance; Pensions; Supplemental Employment Benefits and Severance Allowance. The Surviving Corporation also agrees to union security and checkoff, and to honor length of service with CCC (Series 200) and GP. [G.C. Exh. 19 at 74–75.][12]

Later in the meeting during a discussion of some financial aspects of the acquisition, union counsel Delaney pointed out that the agreement referred to a stock purchase closing date and asked whether the transaction was a stock purchase, a sale of assets, or both. Biggert suggested that the matter was complex and could not be characterized as either.

As the meeting progressed, Lynch indicated that while the Union's priority was to maintain the master agreement, at a minimum, bargaining had to be on a multiplant basis. He further suggested that the parties could agree to limit the Inter Plant Job Opportunity program (IPJO) (a contractual under-

stock for $100 until the merger took place. Thus, in large measure, the transaction was contingent upon US Can's ability to obtain new financing, and thereby eradicate its debt ceiling so that the merger could occur.

[12] This same provision appeared in the May 11 copy of the acquisition agreement which Lynch received. (See G.C. Exh. 18 at 75–76.)

taking which provided for trqnsfers of laid-off employees to available positions at other Continental plants) solely to the four plants involved in the acquisition. Brock responded that these plants had nothing in common.

Before the meeting concluded, Lynch requested a copy of the entire acquisition agreement. As he explained at the hearing, Lynch made this request after observing several differences between the draft Stulman had sent him and the section which Brock distributed. Specifically, the cover sheet of the draft was dated May 11, rather than May 13, and an entity referred to as GP Holding Co. was supplanted by one titled GP Acquisition. In addition, he noted that the pages within the excerpt were numbered differently than those in the draft. Biggert responded to Lynch's request for a complete agreement by commenting that the Union had enough to do. Lynch then promised to ''decipher'' the document which Brock had given them and return with more detail and comments. However, he insisted that ''There is no way that we plan to separate these four plants.'' (G.C. Exh. 45 at 21.) Biggert closed by saying that ''we are in preliminary discussions'' and that ''rather than trying to draw lines at this point, [let's] get the issues in a form which we can talk with substance.'' (G.C. Exh. 45 at 20.) In fact, the Union did not obtain a copy of the complete agreement until after the charge was filed in this matter.

In a June 1 letter, Lynch wrote to Stulman that Brock had taken the position that the master agreement did not apply and that bargaining on a multiplant basis was not required. Amplifying on these comments at the hearing, Lynch testified that he believed the Respondent simply was taking a hard line in putting forth its bargaining proposals.

During a meeting on June 28, Stulman advised Lynch that a lawsuit filed on June 1 by the International Association of Machinists (IAM) was delaying the financing of the purchase. In fact, Lynch knew of the case having spoken with an IAM vice president about the prospect of such an action several months earlier. Lynch understood generally that the complaint, which alleged a fraudulent conveyance, was intended to prevent the transaction from being consummated. However, he maintained that he was unfamiliar with the details of the case and had never read any of the pleadings.

Lynch contacted Brock next on July 14, 1987, to invite him to attend a conference of the ''Can Council,'' a group composed of the Steelworkers and the three major container producers in the United States. When Lynch advised him that the Can Council participants were signatories to the Union's master agreement, Brock declined to attend. Brock again told Lynch that Respondent would not sign or adopt the master agreement and would negotiate only plant by plant. Reacting strongly to these words, Lynch warned Brock that the Union would bring its legal and economic might to bear against Respondent and that single plant bargaining would never happen. When Brock asked if Lynch was refusing to bargain, the union leader said that was not the case.

Subsequently, Brock sent Lynch some suggested meeting dates and a draft proposal for the two units at the Clearing/North Grand plant. Lynch replied that he Union was prepared to negotiate but for the purpose of reaching a single agreement covering all four plants. Brock wrote again reiterating that Respondent would not accept the master agreement or bargain on a multiplant basis.

When the parties met next on August 20, it was clear that neither side had altered their positions: Brock confirmed that US Can would not apdot the master agreement or agree to multiplant bargaining. Equally adamant, Lynch restated the Union's position that the Respondent should accept the master agreement or, alternatively, bargain for a single agreement covering all four plants. With the lines clearly drawn on this issue, Brock stated that they were at impasse. Lynch disagreed, pointing out that since Respondent had accepted the economic terms of the master agreement, usually the most difficult items to resolve in collective bargaining, in actuality, the parties were not far apart. Brock concurred in this agreement, but maintained that since each of the four plants performed different functions and local conditions varied, Respondent had to tailor the labor agreement to the special circumstances of the individual facilities.

No further negotiations took place in 1988 nor have the parties reached agreement on a new contract to succeed the master agreement which expired on February 19, 1989.[13]

C. *Respondent's Labor Policies and Practices Following the Acquisition*

As described above, the Union learned on May 26 that Respondent would ''provide the economic benefit levels presently in effect under the Collective Agreement for their term including . . . Wages and Salaries; Overtime, Holidays; Vacation and Explanded Employment Opportunities; Insurance; Pensions; Supplemental Unemployment Benefits and Severance Allowance.'' (G.C. Exh. 19 at 75.) In addition, Respondent pledged to observe seniority for all purposes and continue union security and checkoff. As Brock explained at the hearing, Respondent agreed to preserve these terms in the hope that by avoiding labor strife, the Company could assure its customers that it would carry on as a reliable supplier.

Notwithstanding its formal repudiation of the master agreement, the Respondent observed a number of contractual terms beyond those identified in the acquisition agreement. It is undisputed that Respondent paid contractually mandated $300 bonuses to bargaining unit employees on February 18, 1988. In February 1988 and 1989, Respondent also factored annual cost-of-living adjustments into the employees' regular hourly wage rates in accordance with the master agreement.

Respondent also agreed to adhere to the grievance and arbitration procedures in the master agreement with one exception.[14] But Respondent did more than simply follow the contract's procedural requirements; numerous documents in evi-

[13] The parties had a few other nonproductive contacts in 1988. On October 19, 1988, Lynch and the vice president of the IAM sent a joint letter to Brock stating that both unions wished to negotiate a multiplant agreement. Brock rejected the overture stating that ''little can be accomplished by continued restatement of our respective positions on this matter.'' (G.C. Exh. 32.) Also, in October, Lynch arranged a meeting between Brock and the Union's district director in California, Bob Guadiana, since Respondent was considering purchasing another Continental plant in that State which was covered by the Steelworkers' master agreement. Although Guadiana initially expressed interest in such negotiations, he subsequently retreated telling Brock that the California plant would have to be included in the master agreement.

[14] At the end of the May 26 meeting, Brock told Lynch that although Respondent would follow the grievance arbitration provisions, it would not agree to expedited arbitration or a permanent umpire as provided in the contract.

dence show that Respondent's plant managers frequently invoked various provisions in the Agreement to resolve substantive disputes.

For example, at the Passaic facility, Plant Manager Martin denied a grievance concerning the discharge of an employee who had worked for less than 30 days by citing section 12.3 of the master agreement which provided that no grievance may be filed contesting the discharge of a probationary employee. In September 1988, an interim plant manager at Passaic authorized payments at overtime rates to three grievants based on alleged violations of the contracting out provisions of article 2.4 of the master agreement. The official told the local union president that he was settling these grievances because of previous unfavorable arbitration rulings against the Company in similar cases.

Clearing/North Grand Plant Manager Prosky also relied upon article 2.4 in denying 23 grievances filed between May 1987 and May 1988, all of which dealt with alleged subcontracting violations. Again, in February 1988, Prosky invoked the master agreement's management-rights clause to deny an employee's claim that his seniority rights were violated. He wrote, in pertinent part:

> Local Management denies that it has violated any labor agreement provisions. As specified in the Master Agreement, ''management responsibilities' mean that ''. . . the Company shall manage the plant, direct the work forces, plan, direct, and control plant operations, . . . relieve employees from duty because of lack of work and for other legitimate reasons.'' This is exactly what Local Management did.

Moreover, Prosky referenced article 8.4 regarding exceptions to overtime pay in denying a grievant's claim on February 26, 1988. The plant manager for Human Relations at Clearing/North Grand also cited the master and local practice in denying a grievance related to a rearrangement of the holiday schedule. In contrast to the many times that Prosky invoked the provisions of the labor contract, on three occasions he rejected grievances on the grounds that the master agreement no longer applied. However, he did not begin to take this position until the end of 1987.

Again, in June 1988, Respondent processed two grievances eith reference to article 14.2, a ''Justice and Dignity'' provision requiring the suspension of discipline against employees until their grievance were resovled. The record further shows that Respondent followed the safety and health procedures contained in article 16 at least at one of the four plants. Thus, Dupree, the local union president at Burns Harbor, testified without dispute that after the union grieved Respondent's failure to conduct timely joint labor management safety and health committee meetings as required by section 16.2, Crisp, a corporate director of industrial relations at a companywide level, wrote a third-step answer which promised that the Company would hold regular meetings.[15] Burns Harbor Plant Manager Stiner also assured Dupree that monthly safety meetings would be held and inspection reports issued. However, Dupree acknowledged that he failed to follow up on management's agreement to hold monthly meetings.[16] The local union president at the Derry plant also conceded that at about the time of the takeover, the safety meetings simply ceased and never resumed.

In addition to the provisions discussed above, the Respondent continued to abide by a wide array of other terms in the agreement including article 2.3 (prohibiting nonbargaining unit employees from working on bargaining unit jobs); 4.2 (preservation of local customs not in conflict with the agreement); 6 (management rights); 15 (leaves of absence without pay); 18 (union bulletin boards); 20 (access of nonemployee union representatives); 21 (military service); 25 (no strike-no lockout); 27 (bereavement leave).

In support of its position that it did not assume the master agreement, the Respondent pointed out that there was a number of noneconomic terms which it did not implement such as its refusal to recognize the multiplant bargaining unit defined in article 2, the discontinuance of the Inter-plant Job Opportunity Program outlined in article 29, and rejecting of a permanent arbitrator or expedited arbitration outlined in articles 13.9 and 13.10.[17] In response to Respondent's contention, the General Counsel and the Union countered that many of the provisions, which the Respondent claimed to have rejected, never were implemented either before or after Respondent's advent, such as a contractual undertaking to establish Joint Civil Rights and Job Evaluation Committees at each plant, a Joint Training Apprenticeship Program, a schedule of wage rates for apprentices, the duty to reduce local customs to writing, or to take written minutes of step 2 grievance meetings.

In addition, Respondent's failure to deny the applicability of IPJO in answering a grievance which alleged a violation of that provision, created some ambiguity about his contention that the contractual provision was inapplicable. Thus, on June 22, the Clearing Local filed a grievance contending that employees from the Continental IPJO list should have been recalled. Without referring to IPJO, the Company's step one answer denied the claim based on a management-right theory. Not until its December 17 step 2 answer did Respondent assert that it was not part of the master agreement and, therefore, not obligated to recall Steelworkers from an IPJO list.

D. *Facts Bearing on the Appropriate Unit Question*

At no time after May 13, when Respondent effectively took over the management of the four affected plants, were operations there interrupted, nor did any changes occur involving bargaining unit employees. Following the acquisition, the Respondent continued to employ the same bargaining unit workers who were designated according to the same job classifications and titles, performed the same jobs at the same locations, and produced the same products utilizing identical processes and equipment, except for some new, more modern machinery which had been introduced.

Thus, before and after the acquisition, the labor force at the Derry plant continued to use the same skills to produce aerosol cans; Clearing/North Grand remained an ends center,

[15] On several occasions, Crisp wrote third-step grievance answers stating that Respondent was not obligated to follow the master agreement.

[16] Dupree acknowledged that he failed to follow up on management's agreement to hold monthly meetings.

[17] The Respondent's refusal to accept the multiplant unit or the IPJO program are separate issues which will be discussed in greater detail elsewhere in this decision.

manufacturing tops and bottoms for cans; Passaic produced speciality vials such as aspirin containers and oil cans, and Burns Harbor served as a lithographic center. There was little integration of these products among the four plants with the exception of Burns Harbor which supplied some lithography to the other three plants and Clearing/North Grand which, prior to its closure, shipped some container ends to Derry. Subsequently, Derry received ends principally from another of Respondent's plants in Horsham, Pennsylvania, where production and maintenance employees are represented by a different union.

The skills and equipment necessary to manufacture these different products varied from plant to plant. However, Respondent's director of human resources testified that machinists in the can industry such as those at Passaic and Clearing/North Grand, probably could exchange jobs without additional training. Interchange among employees in the four union-represented plants was nonexistent after the takeover. The record fails to show whether this was because Respondent refused to adopt the IPJO program, or because employees simply were not interested in applying for IPJO transfers. However, before the acquisition, IPJO was rarely invoked; only one such transfer occurred and that took place some 15 years ago.

Pursuant to Respondent's pledge in the acquisition agreement, after the sale, employees in the five Steelworkers bargaining units continued to share the same terms and conditions of employment set forth in the master agreement as they had under Continental. Thus, in accordance with the master, unit employees uniformly were paid according to the negotiated wage scales described in articles 8 and 9. They also received across-the-board wage increases in the form of cost-of-living adjustments and bonuses effective at specified dates. Further, they all continued to work the same number of hours and receive the same number of holidays and weeks of vacation as prescribed in the master. They also continued to follow the same grievance procedures, the same basic seniority rules, and were subject to the same supplemental unemployment benefits plan detailed in articles 13, 12, and 24 respectively.

In addition, the pension and insurance plans were equally applicable to all employees represented by the Union. Significantly, when Respondent introduced a substituted pension plan with union acquiescence, Brock addressed a memo to the affected bargaining unit employees stating ''Dear hourly U.S. Can employee: Effectively February 1, 1988, your union negotiated benefits will be administered by Provident Life Insurance Company.'' (G.C. Exh. 37.)

These same employees continued to work under a common union-security clause and have the same amount of union dues automatically deducted from their paychecks each month. In accordance with article 5.6 of the master agreement, forwarded the dues payments to the International union.

Continuing Continental's practice, Respondent observed local customs and practices which were memorialized in individual plant agreements. Article 4 authorized such local supplements as long as their terms did not conflict with the master agreement.

Respondent also preserved intact the bureaucratic structure of the four purchased plants, making no changes in plant management or supervisory personnel, other than those caused by normal attrition. Matters such as hiring, training, and firing continued to be handled locally. In accordance with the master agreement, grievances were processed within each plant through the third step although at that point, management's representative was an officer at the corporatewide level. Early in 1988, Respondent reorganized its human resource structure, so that different regional managers for human resources became responsible for answering third-step grievances at Derry and Burns Harbor.

E. *Respondent's Discontinuance of IPJO*

Based on the Union's third amended charge dated October 4, 1988, an amended complaint issued alleging, in substance, that the Respondent had unlawfully altered terms and conditions of employment by unilaterally discontinuing the Inter-Plant Job Opportunity (IPJO) program set forth in article 29 in the master agreement, pursuant to which an employee may transfer to another facility in the event of a layoff of at least 30 days or a permanent plant closing. (G.C. Exh. 10 at 89 et seq.)

The record indicates that the first reference to IPJO occurred at the May 26 meeting when Lynch suggested limiting the program to the four newly acquired plants. Brock testified that he responded that US Can was not going to have an IPJO program for those plants because they were distinct operations.

Respondent contends that the Company also announced that IPJO would be discontinued at a May 22, 1987 meeting between Human Resources Director Crisp and Passaic bargaining unit members, including George Halligan, president of the local there. In answering a question from the employees regarding transfers from the four acquired plants to Continental facilities, Crisp testified that he answered that IPJO was ''non-operational.''[18]

Contrary to Crisp's testimony, Halligan indicated that he did not learn of IPJO's discontinuance until December 1987, when, after the shutdown of the Passaic plant was announced, he asked Plant Manager Martin if employees could put IPJO into another plant. Martin told him then that ''there is no such thing as IPJO'' at US Can. Subsequently, at an April 1988 meeting with Passaic employees, Martin gave the identical response when questioned about the possibility of IPJO transfers to another US Can plant. Later that same month, in preparation for a meeting, Halligan compiled a list of written questions which were sent to Crisp, one of which asked, ''Will employees be able to get on IPJO list for Continental Can Company or United States Can Company as per contract.'' In a written response given to Halligan on July 20, 1988, Respondent answered, ''there is no such thing as IPJO for US Can employees. (G.C. Exh. 40.)

James Dupree, local union president at the Burns Harbor plant recalled that in September 1987, he asked Plant Manager Stiner when temporary summer employees were going to leave and whether they would be replaced by employees seeking IPJO transfers. Stiner advised him that the summer employees would be retained permanently and that Respondent was not going to use IPJO.

[18] In its brief, Respondent improperly referred to testimony concerning an inquiry by another employee regarding IPJO rights which was stricken from the record on hearsay grounds. (See Tr. 569.)

Subsequently, at a negotiating meeting between the parties held on January 24, 1989, Brock suggested that the Respondent was interested in settling the IPJO issue and asked the Union to furnish names of employees who wanted to transfer. According to Brock, Jack Burris, a union representative, was assigned responsibility for locating interested IPJO candidates at Clearing/North Grand.[19] Brock and Stiner testified that when they asked at subsequent meetings in February whether anyone had been identified, Burris initially indicated that he still had to check with the local president at Clearing and later responded that no one was interested in an IPJO transfer.

The Union offered a somewhat different account of this matter. Ken Massengil, an International representative for the Steelworkers who chaired the January-February 1989 bargaining sessions, testified that the Union requested that the Respondent canvas the then laid-off Clearling/North Grand employees to determine whether anyone wished to transfer to Burns Harbor under IPJO, but that no mention was made of employees at the closed Passaic plant.

III. DISCUSSION AND CONCLUDING FINDINGS

A. *Parties Contentions*

The ultimate issue in this case is whether Respondent must bargain with the Union on a multiplant basis. In accordance with allegations in the complaint, the General Counsel and the Charging Party present several theories, any one of which would oblige the Respondent to bargain on a multiplant basis. First, they submit that as a successor, Respondent constructively assumed its predecessor's labor agreement, including a contractual duty to recognize the multiplant unit. Alternatively, they contend that the Respondent's acquisition of Continental's general packaging division was a stock transfer so that Respondent continued as the same employing entity with a duty to honor the existing labor agreement. Further, counsel for the Government and the Union contend that Respondent may not refuse to bargain with a multiplant unit since it remained appropriate following the acquisition. Lastly, counsel urge that as a successor, Respondent was obliged to maintain the terms and conditions of employment until bargaining to impasse. Accordingly, Respondent violated the Act by discontinuing the IPJO program.

The Respondent claims that it was a successor. As such, in accordance with *Burns*, it was required to recognize and bargain with the Union, but had no duty to abide by its predecessor's labor agreement. Therefore, in negotiating a new contract, it had a right to insist on single plant bargaining. Respondent also asserts that it properly insisted on single plant bargaining because the multiplant unit was inappropriate under the Board's traditional community-of-interest standards. It further claims that its abandonment of IPJO is a moot issue. In addition, Respondent strenuously argues that all the Union's charges are time barred.

[19] Brock stated that he believed Burris was responsible for identifying IPJO candidates at all four acquired plants while Stiner testified that Burris' function was limited solely to Clearing. Since Burris only represented the Clearing employees, it is reasonable to infer that his task was the more limited one described by Stiner.

B. *Respondent was Bound to the Master Agreement by its Course of Conduct*

Applicable Precedents

A resolution of the principal issue in this case—whether Respondent is bound to the master agreement and to the multiplant unit to which it applied—starts with the principles governing successorship set forth in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). There, the Supreme Court held that a successor must recognize and bargain with the collective-bargaining representative of its employees, but is not bound by its predecessor's preexisting collective-bargaining agreement. The Court further held in *Burns* the successor ordinarily is empowered to establish its own starting wages and working conditions. However, if the new employer makes it perfectly clear that all of the employees in the unit will be retained, then it may not alter terms and conditions of employment without first bargaining to impasse with the employees' representative.

The Court further recognized that although a successor will not necessarily be required to assume an old collective-bargaining agreement, situations may occur where a successor expressly or impliedly adopts its predecessor's contract, finding it more advantageous to do so than face ''uncertainty and turmoil.'' Id. at 291. The Board has construed *Burns* as ''counseling utmost restraint in applying such an adoption theory, absent clear and convincing evidence of consent, either actual or constructive.'' *All State Factors*, 205 NLRB 1122, 1127 (1973), quoted in *E G & G Florida, Inc*., 279 NLRB 444, 453 (1986).

Notwithstanding this cautionary note, the Board, with Court approval, has found implied adoption of a predecessor's collective-bargaining agreement based on the successor's course of conduct even where the successor expressly disavowed the outstanding labor contract. *Eklund's Sweden House Inn*, 203 NLRB 413 (1973), the case principally relied upon by the General Counsel and the Union in squarely in point. In *Sweden House*, the successor executed a sales agreement for the purchase of a motel which stated that the collective-bargaining agreement was not ''assigned to nor assumed by Eklund Sweden House Inn, Inc., as part of this transaction.'' Id. at 415. Following the sale, Sweden House checked off contractually required dues for just 1 month, gave the employees a raise after the manager explained that he had read the contract to see if it was all right to do so, and in bargaining with the Union, proposed management-rights and no-strike clauses to be added to the terms of the existing contract. Following this meeting, counsel for Sweden House wrote to the Union that ''the Agreement between your union [and the predecessor] was not assigned to nor assumed by'' our client. Id. at 415.[20] Concluding that the successor's conduct negated its repeated disavowals of intent to assume the predecessor's contract, the Board stated in unequivocal terms that:

> These three instances in which the existing contract was positively relied upon . . . would effectively cancel any

[20] Respondent mistakenly argued in its brief that the successor in *Sweden House* never disclaimed adoption or sought to negotiate a new contract. The facts in that case, as briefly outlined above, show otherwise.

> intent to the contrary which Respondent may have previously or subsequently manifested . . . and most certainly it abrogates its agreement with the seller . . . not to assume the contract. . . . Under such circumstances, therefore, nothing in the *Burns* decision would negate the Respondent's obligation under the contract between it and the Union for the simple reason that it has given, by its action, ''consent to be found by it.'' [Id. at 418.]

The Board also found adoption based on the actions of successors which neither disavowed nor affirmatively expressed an intent to assume their predecessors contract. Thus, in *Ethan Allen, Inc*., 218 NLRB 208 (1975), enfd. in part 544 F.2d 742 (4th Cir. 1976), the administrative law judge, with Board and court approval, found that the successor had assumed its predecessor's labor contract by following the agreement's provisions with regard to seniority, paid vacations, pay raises, health and welfare fund contributions, and union dues payments. In addition, the successor permitted union representation during employee disciplinary meetings, permitted employees to engage in union business on company time and allowed the union to maintain an office in the plant. Similarly, in *Amateyus, Ltd*., 280 NLRB 219 (1986), enfd. 817 F.2d 996 (2d Cir. 1987), the successor and its alter ego were required to honor its predecessor's contract where the new employer checked off union dues and deductions for a vacation fund, paid arrearages to the union pension, welfare and annuity funds and consulted with union officials.

However, the Board has taken a different position and refused to find constructive or implied adoption where the successor did no more than implement terms of a preexisting agreement which were required by law. For example, in *E G & G Florida*, supra, the Respondent simply ''complied with the requirements of the Service Contract Act, paying its employees wages and fringe benefits at least equal to those paid by the predecessor.'' The administrative law judge concluded that the successor should not be bound to a contract for ''merely doing what it was obligated to do by statute.'' Id. To the same effect, the administrative law judge in *Virginia Sportswear*, 226 NLRB 1996, 1302 (1976), ruled that a wage increase granted by the successor which was in accord with the predecessor's collective-bargaining agreement, also was mandated by the minimum wage laws.

C. *Contract Adoption Principles Applied to Respondent's Labor Practices*

The above cited cases instruct that when determining whether a successor has assumed its predecessor's contract, the Board focuses far less on a successor's pronouncements of subjective intent than on its objective actions, apart from those which may be compelled by law. Consequently, on evaluating the facts of this case in light of these precedents, I conclude that despite its disclaiments, the Respondent voluntarily followed the vast majority of the master agreement's provisions, and by so doing, assumed it.

In reaching this conclusion, I do not rely on the fact that the Respondent committed itself from the outset to providing ''economic benefit levels presently in effect under the Collective Bargaining Agreement''[21] for it was required to do so under the authority of *Burns*, supra at 293. Instead, the finding of adoption here is based solely on objective evidence which establishes that Respondent implemented many significant terms of the master agreement far beyond what precedent required.

Respondent went beyond merely maintaining the ''Wages and Salaries; Overtime, Holidays, Vacation and Expanded Employment Opportunities; Insurance [and] Pensions'' guaranteed in the master agreement—it promised to adhere to those terms for the life of the contract; that is, until the expiration date in February 1989. Under *Burns*, a successor which hires its predecessor's work force is obliged to maintain the economic terms of a contract only until impasse is reached. Here, because of its desire to maintain labor peace to assure its customers of an uninterrupted supply, but before it could know when or whether bargaining might result in impasse, Respondent promised to follow most provisions in the master agreement throughtout its term. Indeed, Respondent kept its commitment even after declaring impasse on August 20.[22]

The desire to maintain harmonious labor relations also may have prompted Respondent to grant bonuses and cost-of-living wage adjustments to unit employees in both 1988 and 1989 in accordance with the master agreement. Again, *Burns* simply requires that a successor preserve the wage levels in effect at the time of the takeover; that case does not hold that a successor must institute future wage increases specified in the predecessor's labor agreement. Respondent's decision to maintain contractual terms and conditions of employment for the agreement's duration, beyond those which it was legally required to observe, represents significant evidence of constructive adoption.

Respondent went even further, promising in the acquisition agreement that it would continue to check off union dues and abide by union security, terms which are found in article 5 of the master agreement. Brock offered the following rationale for the Company's conduct:

> these are provisions, again, within a normal contract that if you have had long term relationships with unions, they are normal. . . . And, they are part of day to day business. We had no intention of not having that continued relationship. So we agreed that, one, we would agree to the Union's security and the checkoff.

Brock's explanation is telling, if inadvertent, evidence of Respondent's desire to maintain a long-term, normal contractual relationship with the Union.

[21] G.C. Exh. 19 at 74 (Acquisition Agreement, sec. 6.03, dated May 13, 1987).

[22] As the new owner-operator of the General Packing subsidiary, Respondent concededly believed that its business interests were well served by abiding by the preexisting economic terms for the life of the master agreement. Respondent's interests were quite different from and far longer in range than those of the successor in *All State Factors*, 205 NLRB 1122 (1973). There, the successor, a secured creditor, took possession of its collateral—its predecessor's business, with no intent to operate it and continued the predecessor's wage scale and pension fund payments only until it could sell the business, a situation known to the employees. The successor's decision to abide by some of the terms of the collective-bargaining agreement in *All State Factors* was a temporary expedient and is one of the key facts which distinguishes that case from the instant one.

In *Bethlehem Steel Co*., 136 NLRB 1500, 1502 (1962), enfd. in relevant part 320 F.2d 615 (3d Cir. 1963), the court observed:

> The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which fonforms to Section 8(a)(3). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a . . . contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements.

Respondent correctly points out in its brief that the *Bethlehem* case holds only that an employer lawfully may refuse to continue complying with union-security and dues-checkoff clauses at the expiration of an agreement. It also is true, as Respondent contends, that continued observation of these provisions, standing alone, may not automatically resurrect an entire contract. But *Bethlehem's* application to the matter at hand is broader than Respondent suggests: since US Can was not compelled to continue union security or dues checkoff, its unilateral decision to do so constitutes further prooff that it assumed the master agreement as part of the normal and least disruptive way of doing business, just as Brock suggested.

Additional support for finding constructive adoption stems from Respondent's repeated recourse to the terms of the collective-bargaining agreement in resolving grievances. In keeping with the Board's decision in *Indiana & Michigan Electric Co*., 284 NLRB 53 (1982), Respondent was obliged to process grievances through at least the third step.[23] But that case deals with the duty to observe grievance procedures, it does not in any way affect the substantive outcome of such grievances. Thus, Respondent was not compelled to resolve grievances by relying on various terms in the master agreement. Yet, that is exactly what occurred here. Respondent frequently relied on the agreement's language to resolve grievances, citing clauses dealing with contracting out, management rights, seniority, holidays, and overtime pay to justify its actions. Moreover, on one occasion, Respondent answered a first-step grievance alleging an IPJO violation without referring to its contention that the IPJO program was defunct. In other words, Respondent failed to deny the applicability of the master when it had an opportunity to do so. The management officials who answered these grievances evidently regarded the master agreement as the controlling instrument and effectively indicated as much both to the employees involved and to their union representatives.

Respondent clearly exceeded what is demanded of a successor, implementing much more of the master agreement than it disregarded. Respondent explained that it simply followed the agreement because it provided a convenient roadmap for dealing with terms and conditions of employment. But collective-bargaining agreements serve exactly that purpose—they are roadmaps which chart a course so that the parties governed by them may understand their rights and responsibilities. The Supreme Court's observation in *Burns*, supra at 291, that successor employers may willingly ''observe the pre-existing contract rather than face uncertainty and turmoil'' is particularly apt in this case. Here, Respondent concededly chose to implement most of the master agreement because it concededly wanted to purchase labor peace as a way to secure business stability. But that goal is poorly served when an employer implements the most significant terms of a contract while selectively disavowing some others, a number of which never were implemented in the first place.[24]

Overall, the extent to which Respondent adhered to the terms of the master far surpassed the conduct of the successor in *Eklund's Sweden House*. If the employer in *Sweden House* was found to have adopted its predecessor's collective-bargaining agreement in spite of disclaimers, the same result must follow here. Accordingly, I conclude that by its conduct, Respondent began assuming the master agreement as early as May 13, 1987, and continued following most of its provisions for the balance of its term. Respondent was not at liberty to adopt most terms of the agreement while disavowing others, including the duty to recognize a multiplant unit.

D. *Stock Transfer Theory*

The complaint also alleges alternatively that by acquiring the stock of Series 200 and continuing to operate that business in essentially unchanged form, Respondent continued as the same employing entity and was, thereby, bound to the master agreement. However, I already have found that the Respondent is a successor which assumed the master agreement by its course of conduct, and is thereby obliged to recognize and bargain with the Union on a multiplant basis. Therefore, it is unnecessary to also determine whether US Can was a continuing owner by virtue of the stock transfer, for the same outcome would obtain. Consequently, I decline to decide whether Respondent is liable under the alternative stock transfer-continuing employer theory.

E. *Multiplant Unit Remained Appropriate After the Takeover*

Relying on *White-Westinghouse Corp*., 229 NLRB 667 (1977), enfd. 604 F.2d 689 (D.C. Cir. 1979), the General Counsel and the Charging Party submit that even though only four plants were acquired which were part of a larger multiplant unit under the predecessor, the bargaining unit employes in these plants continued to constitute an appropriate, albeit diminished multiplant unit, sharing a community of interests in commonand terms and conditions of employment which were forged and reinforced by successive collective-bargaining agreements. Not surprisingly, the Respondent disputes the applicability of *White-Westinghouse*, contending that, unlike the successor in that case, it did not adopt its predecessor's collective-bargaining agreement.

[23] Under *Indiana & Michigan*, supra, after a contract has expired, only grievances affecting vested interests must be arbitrated. In the case at bar, the parties stipulated that no grievances were taken to arbitration. The record fails to show, however, whether the Respondent refused a union request for arbitration or whether the union simply never requested that a matter be submitted to arbitration.

[24] The Respondent indicated that it did not wish to accept an agreement covering a multiplant bargaining unit since, among other reasons, a single expiration date would give the Union an advantage in the event of a strike.

Moreover, Respondent contends that the four acquired plants did not share a community of interests sufficient to establish their appropriateness in a single unit. For the reasons set forth below, I agree with the General Counsel and the Charging Party that *White-Westinghouse* is dispositive.

In *White-Westinghouse*, a subsidiary of White Consolidated Industries (White or the successor) purchased five appliance plants from a sister company, the Westinghouse Corporation, in 1975. The acquired plants were part of a multiplant bargaining unit consisting of 42 certified units at 40 plants covered by a National agreement between the International Union of Electricians (IUE) and the predecessor. Following the acquisition, White agreed to adopt the outstanding agreement. However, when the contract expired in July 1976, White refused to bargain on a multiunit basis, insisting to impasse on single plant bargaining. At that point, a strike ensued.

On these facts, the Board, adopting the administrative law judge's decision, found that through their agreement and by the nature of their negotiations, the predecessor and the IUE had merged the 42 units in a single, multiplant unit. The Board further found that as a successor, White was obliged to bargain with the IUE for a multiplant unit comprised of the five appliance division plants. Specifically, the Board found (1) that the Company had succeeded to the multiplant obligation of its predecessor because it continued operations substantially unchanged in an appropriate unit and (2) that the successor had consented to the multiplant unit by assuming the preexisting labor contract between the IUE and the predecessor and by dealing with the union on a multiplant basis during the unexpired term of that agreement.

In finding a multiplant unit appropriate in *White-Westinghouse*, the judge reasoned as follows:

> Thus, Respondent's contentions are reduced to the . . . assertion that the five plant successor unit is inappropriate. I find, to the contrary. . . . The unit sought is made up of a definable grouping—the Union-represented portion of the Westinghouse appliance division purchased by White. All of the employees involved were covered by the same National Agreement which was assumed by the Respondent. Some plants were covered by the National Agreement for 20 years. Although this multiplant unit was only part of the industrywide unit . . . under Westinghouse and only part of White's appliance division which included some plants not represented by the Union, its bargaining history is such that the wages, terms and conditions of employment involved were determined as a group. For example, all former Westinghouse employees have pension rights negotiated by the Union on a national basis. . . . wages, benefits and working conditions . . . have been negotiated on a group basis. All have a national representative in appeal level grievances and all have surrendered the decision to arbitrate significant grievances to the Union on a national basis. *Thus, there is a community of interest among the former Union-represented . . . employees, quite different from other White employees simply because of their historical multiplant representaion. Any prior differences, including geographical separation and lack of interchange of employees—matters sometimes relevant in determining ab initio unit appropriateness—are rendered considerably less significant by this common history*. [Emphasis added. Id. at 674–675.]

Irrespective of White's adoption of the National agreement, the Board found that the five IUE-represented plants remained an appropriate unit because their common bargaining history resulted in common wages, benefits, and working conditions. The Board concluded that these shared factors created a community of interests among the employees which outweighed any differences among them.

The parallels with the instant case are manifest. Here, as in *White-Westinghouse*, the successor purchased a number of plants which for varying periods of time were part of a larger multiplant unit.[25] In finding the difference in size between the predecessor and White-Westinghouse successor unit irrelevant, the Board pointed to precedent holding that the purchase of only a part of a preexisting appropriate unit does not defeat a successor's obligation to bargain in the reduced, acquired unit. Id. and cases cited therein. Since the reduction in size of the unit from 40 to 5 plants made no difference in *White-Westinghouse*, neither should a similar reduction from 42 to 5 units be a relevant factor here.[26]

Moreover, here, as in *White-Westinghouse*, the conclusion that the unit remained appropriate turns largely on the fact that a common bargaining history unified employees who, both before and after the takeover, shared identical terms and conditions of employment. The series of collective-bargaining agreements negotiated on behalf of both the Westinghouse and the Continental units over the years provided a consistent framework which reinforced the common interests of all bargaining unit employees. Thus, the master agreements were proof that uniform terms were negotiated on a group basis covering wages, hours, and most other working conditions significant to employees, including but not limited to seniority standards, pensions, vacations, holidays, grievance procedures and a unitary job classification system. Like the *White-Westinghouse* National agreement, the labor agreement at issue here provided that locals at the plant level could enter into supplemental contracts as long as they did not conflict with the master. Similarly, under Continental, the unit employees had authorized the International union to engage in arbitration on their behalf and determine whether strike action was warranted. As the court of appeals pointed out, ''Labor disputes arising in these, as well as other, areas

[25] The union-represented employees at the Clearing/North Grand and Passaic facilities were part of the bargaining unit since 1956; those at Burns Harbor since 1975. Employees at Derry did not join the multiplant unit until 1985. However, their 2-year history under the master agreement prior to Respondent's acquisition does not defeat a finding that they shared common interests with other employees under the master. See, e.g., *Westinghouse Electric Corp*., 227 NLRB 1932 (1977). [Facility under National agreement for 14 months.]

[26] The further dimunition in size of the bargaining unit caused by the closure of the Clearing/North Grand and Passaic plants in 1988 and 1989 respectively, had no bearing on Respondent's bargaining duty which arose at the time of the takeover. In any event, it is well settled that a reduction in the scope of a unit does not preclude the lesser unit from being appropriate. See *Fall River Dyeing Corp*. v. NLRB, 482 U.S. 27 (1987); *Middleboro Fire Apparatus*, 234 NLRB 888, 893 (1978), enfd. 690 F.2d 4 (1st Cir. 1987); *White-Westinghouse*, 604 F.2d at 695.

would have a similar impact on all former Westinghouse appliance division employees.'' 604 F.2d at 696. With the substitution of names, the Board's conclusion in *White-Westinghouse* is well tailored to the facts of this case: ''there is a community of interest among the former union represented [Continental] employees, quite different from other [US Can employees] simply because of their historical multiplant representation.'' Id. at 674.

In cases such as this, the object of the inquiry is to determine whether the bargaining unit remained appropriate under the successor. This determination turns on evidence showing whether the successor employer has introduced structural or operational changes which affect the employees' common interests. *Burns*, 406 U.S. at 280; *NLRB v. Indianapolis Mack Sales*, 802 F.2d 280, 284–285 (7th Cir. 1986); *White-Westinghouse*, 604 F.2d at 964. In examining postsuccessorship events in the instant case, it is clear that the Respondent introduced no significant changes; the four acquired plants remained essentially the same in every significant respect. Again, comparisons between postsuccessorship events in this case and those in *White-Westinghouse* are instructive.

In *White-Westinghouse*, the degree to which the successor maintained continuity in its operations and organizational structure following the takeover supported the Board's conclusion that the five plant unit remained appropriate. These factors are present in this case and support a similar result. Thus, here, as in *White-Westinghouse*, the four plants retained a definable identity as former Continental plants whose previously merged bargaining unit was represented by the Steelworkers.[27] Further, in both cases, the successors took over the acquired plants without introducing any change in operations. The same employees performed the same functions and produced the same goods under the same supervision and plant management, after the purchase as before. As the judge aptly observed in *White-Westinghouse*, supra at 674: ''from the standpoint of the employees in the purchased plants, the employment relationship remained essentially unchanged and it made no difference to them whether all Westinghouse plants or some had been taken over by a new employer.'' Here too, the common work interests of the employees in the former Continental plants were unaffected by the change in ownership.

In *White-Westinghouse*, the Board also relied on the fact that by expressly assuming the National agreement and applying it to the five acquired plants, the successor had agreed to the contours of a multiplant unit. The Board further found that White's conduct following the takeover confirmed the continuity of multiplant bargaining in the successor unit. Id. at 673. In support of this finding, the Board pointed to numerous matters on which White-Westinghouse dealt with the IUE for more than a year, including dues checkoff and pensions. Id.

In the instant case, the Respondent argues that its refusal to adopt the master agreement distinguishes the instant case from *White-Westinghouse*. I do not construe that decision to mean that contract adoption is a crucial ingredient in finding that a unit continues to be appropriate following a takeover. But even if contract assumption is a prerequisite, that element is present here. As found above, Respondent pursued a course of conduct which amounted to constructive adoption. I see no meaningful distinction between an express and implied adoption of a collective-bargaining agreement in terms of its operative effect on the appropriate unit determination.[28]

Thus, by its actions, Respondent effectively substituted itself for Continental and became a party to the multiplant unit master agreement. It committed itself to maintaining not only those economic terms and conditions of employment which were legally required, but also to future economic benefits throughout the life of the contract. Indeed, Respondent recognized, perhaps inadvertently, that the acquired plants constituted an appropriate group when on January 1, 1988, it instituted a pension plant virtually identical to a predecessor plan, which contained the following introduction: ''If you are a member of the bargaining unit as defined herein (Derry . . . Clearing . . . Passaic . . . Burns Harbor. . .), you are eligible to become a member of the Company's Pension plan. . . . If so, you may not be a member of any other Company pension or retirement plant.'' (G.C. Exh. 15 at 1.)

The employees in the former Continental plants also continued to share a community of interest following the transfer by virtue of their seniority rights which were carried over from their tenure with Continental. The acquisition agreement guaranteed these rights in the following terms:

> Subject to the provisions of any collective bargaining agreement with respect to the Employees, the Employees will receive credit, for purposes of all compensation, severance pay, vacation, or other employee benefit plans and programs . . . for all periods of employment which were credited by [the predecessor]. [G.C. Exh. 19 at 81.]

In other words, seniority for all employees in the four plants was based upon their length of employment with Continental, together with their employment with Respondent, subject to the provision of article 12 in the agreement. As a result, employees in these plants shared common seniority interests which affected other conditions of employment (e.g., severance and vacations). This factor differentiated them from employees in other US Can plants and served as yet another unifying bond.

In sum, having voluntarily chosen to follow all of the economic and many of the noneconomic terms of the master agreement, Respondent stepped into the shoes of its predecessor, preserving and perpetuating its separate identity as a multiplant bargaining unit. But even apart from Respondent's adoption of the contract, the evidence fully supports the conclusion that units in the four former Continental plants remained appropriate following the takeover.

Citing *Indianapolis Mack Sales*, supra, as authority, Respondent asserts that traditional community-of interest-factors

[27] In *White-Westinghouse*, the successor established a separate division for the five acquired facilities, thereby forming a more identifiable unit than was the case with the four Continental plants. However, this fact, standing alone, is not dispositive as to the continued appropriateness of a multiplant unit.

[28] The Board did not suggest in *White-Westinghouse* that the successor's express adoption of the National agreement was a critical component of its ruling or that irrespective of that factor, it would not have found that the five plants constituted an appropriate bargaining unit.

must be considered in determining unit appropriateness.[29] Respondent submits that when such factors are applied to the evidence in this case, a unit consisting of the former Continental plants is inappropriate.

Respondent's reliance on the appellate decision in *Indianapolis Mack* is misplaced. The court of appeals in that case was justly concerned with the absence of any record evidence bearing on whether a separate unit of service employees remained appropriate following the change in ownership. In the court's view, bargaining history under the predecessor, standing alone, could not substitute for this omission. The court found the lack of such evidence particularly troubling in light of the Board's failure to explain its deviation from a rule that automobile service and parts employees in the same facility should be in a single unit unless it is affirmatively shown that no substantial community of interest exists between the two groups. Id. at 284–285.

At the trial of this matter, unlike the trial in *Indianapolis Mack*, Respondent had ample opportunity to make the requisite showing. To that end, Respondent introduced evidence showing that the four plants were not geographically proximate; that employee interchange did not occur; that control over employee labor relations and plant operations was largely decentralized; and that there was little product integration or overlap in employee job skills and functions. However, Respondent did not, and could not offer evidence showing that these circumstances differed when Continental was in control. Indeed, it was Respondent's express objective to assure the bargaining unit employees continuity in their employment rights. Accordingly, Respondent made sure that following the transfer, all matters affecting the employment reationship remained the same.

If this hearing had been a proceeding where a unit determination was to be made de novo, or if bargaining previously had been on a ingle plant basis, then the evidence adduced by the Respondent as to lack of employee and product interchange, geographic distance between the plants and localized control over day-to-day operations, might have had greater significance.[30] But where these conditions existed both prior to and after the takeover, where the Respondent made no structural or operational changes affecting the employees at the acquired plants, and where it retained virtually all of the master agreement so that the work force continued to be uniformly affected by identical terms and conditions of employment, then a common history of collective bargaining deserves great weight. See *Miles & Sons Trucking Service*, 269 NLRB 7, 13–15 (1984); *White-Westinghouse*, 604 F.2d at 696.

In any given situation, employees may be grouped appropriately for purposes of collective bargaining in more than one way. The Board may choose among several alternative units, each of which may have a rational foundation, for the Act does not require that the unit designated by the Board be a more appropriate unit or the most appropriate unit; simply that it be an appropriate one. See, e.g., *Retail Clerks Local 1325 v. NLRB*, 414 F.2d 1194, 1202 (D.C. Cir. 1969). The Board's approach in such matters is well illustrated in *Towne Plaza Hotel*, 258 NLRB 69 (1981). That case, like the one at bar, involved a stock transfer in a corporation which continued to exist after the purchase. Rejecting the new owner's argument that the unit was inappropriate because based on the extent of the union's organization, the Board held that it ''will not disturb a bargaining unit which is the product of a longstanding collective-bargaining relationship unless such is clearly repugnant to the purposes and policies of the Act'' and ''while another unit may be more appropriate, such does not make a longstanding, recognized, and contractual unit inappropriate nor repugnant to the Act.'' Id. at 76.

Various competing interests must be balanced when determining the obligations of a successor: the employees' legitimate expectations in continuity of bargaining rights, the employer's freedom to rearrange the newly purchased enterprise and the public's overriding interest in fostering industrial peace and an efficient economy.[31] The conclusion reached here that the Respondent is required to bargain with the Union on a multiplant basis strikes an appropriate balance among these interests. The Respondent chose not to rearrange or alter the basic structure or operations of the newly acquired plants; therefore, in view of the minimal change in the employer-employee relationship, unit employees' expectation of continuity in their bargaining relationships is particularly strong. Moreover, to paraphrase *White-Westinghouse*, the Respondent apparently experienced no difficulty in applying uniform terms to employees in the four plants during the more than 2 years that it implemented the master agreement. Id. at 675. Consequently, requiring bargaining on a multiplant basis will not significantly hinder the Respondent's ability to run its enterprise efficiently. Finally, as the Respondent itself recognized, continuing to treat the plants as a group was the course which best served industrial peace and stability.

Where, as here, it is determined that a multiplant unit is appropriate, it follows that the employer is legally required to bargain with the Union which represents employees in that unit. It is well settled that the scope of the unit is a permissive rather than mandatory subject of bargaining. Consequently, insistence upon a nonmandatory subject as a condition for bargaining is constitutes bad-faith bargaining in violation of Section 8(a)(5) of the Act. *Facet Enterprises v. NLRB*, 907 F.2d 963 (10th Cir. 1990); *White-Westinghouse*, supra at 675; *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958); *Oil Workers v. NLRB*, 486 F.2d 1266, 1268 (D.C. Cir. 1973).[32]

Here, the Respondent admittedly refused to bargain on other than a single plant basis and during negotiations with the Union on August 20, declared that the parties were at im-

[29] In *White-Westinghouse*, 604 F.2d at 965 fn. 17, the court noted that the Board generally considers the following factors in determining whether a single plant or multiplant unit is appropriate: ''(1) common control of operations; (2) integration between plants in products and personnel matters such as job classifications and interchange of employees between plants; (3) geographic considerations, and (4) the existing pattern of representation and history of labor practices.''

[30] This is not to say that these factors may not be considered; only that they are not conclusive nor deserving of primacy in this case.

[31] See *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 262–263 (1974); *NLRB v. Burns Security Services*, supra at 287–288; *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964).

[32] Respondent's bargaining duty with regard to a multiplant unit follows from the finding that the unit remained appropriate after the transfer by virtue of the employees' unchanged community of interests and/or by its constructive adoption of the contract by conduct.

passe on the very issue. Under the above-cited precedents, Respondent's rejection of multiplant bargaining since that date violates Section 8(a)(5) and (1) of the Act.

F. *Respondent Unlawfully Discontinued IPJO*

With one important exception, Respondent willingly assumed the obligations of a *Burns* successor, recognizing that after making it perfectly clear it would retain all the employees in the unit, it was duty bound to preserve the terms and condtions of employment as they existed in the master agreement until reaching a new agreement or bargaining to impasse. 406 U.S. at 294–295. Accordingly, in the acquisition agreement and in its May 14, 1987 letter to the local union presidents, Respondent pledged that while negotiations continued for new contracts, ''the terms and conditions including wages, benefits and working conditions as they presently exist under the collective bargaining agreement with Continental Can Company shall remain in effect.'' Notwithstanding this commitment, Respondent concedes that it discontinued IPJO without first bargaining to impasse with the Union. Respondent poses three defenses to allegations that its unilateral conduct violated the Act. For the reasons set forth below, I find none of Respondent's arguments persuasive.[33]

First, Respondent argues in its brief that when it announced an intent to abandon IPJO at the May 26 meeting, it was not yet perfectly clear that employment would be offered to all former employees; hence, the Company still was privileged to set its own initial terms of employment. I find no merit in this defense in light of the above-quoted promise set forth in Respondent's May 14 letters.

Respondent next contends that the IPJO allegation is moot for although it was willing to settle any IPJO claims, the Union, through its agent, Burris, failed to identify any employee in the clearing unit who wished to take advantage of the program. As described in the fact statement, the Union countered that it requested that the Respondent, not Burris, locate employees from the already closed Clearing and Passaic plants who were interested in ''IPJO-ing.'' As between these conflicting versions, I find the testimony of Plant Manager Stiner the more reasonable for he, like Brock, clearly recalled that Burris was responsible for identifying employees who were interested in IPJO transfers. In addition, he specifically testified that Burris' assignment was limited solely to the Clearing plant. Since Burris was the staff representative with jurisdiction for that facility, it stands to reason that his investigation would focus on just that site. Further, if the Union wished to refute Respondent's contentions about Burris' role, it should have called him as its witness since he was more immediately involved in this incident than was Business Agent Massengill.

In any event, even if no Clearing employee was interested in an IPJO transfer, the allegation that Respondent unlawfully repudiated its obligation to continue IPJO as a condition of employment is not moot. Because the Act is designed to vindicate public rather than private rights, it remains the Board's particular province to remedy violations of the Act. Therefore, even where a respondent remedies a wrong, the Board will not dismiss an unfair labor practice alleged in a complaint unless the respondent posts a notice assuring employees that it has rescinded its wrongful actions, gives assurances that similar conduct will not take place in the future, and restores the status quo. *Electrical Workers IBEW Local 1316*, 271 NLRB 338, 341 (1984).

The Respondent's efforts to resolve the IPJO allegation fall short of satisfying the foregoing standards. The Company has not acknowledged that its action was unlawful nor given any assurance that such conduct will not recur. Further, there is no indication that the Respondent has taken adequate measures to restore the status quo. Respondent made no effort to discover whether any employees at the Passaic plant wished to take advantage of their contractually guaranteed right to transfer to another facility and resisted the Union's request to determine whether any employees were eligible under IPJO to replace summer employees at the Clearing facility prior to its closure.[34] Given these circumstances, this matter is not moot. It follows that in the absence of a meritorious defense, Respondent's unilateral decision to discontinue the IPJO program violated Section 8(a)(5) and (1) of the Act.

G. *The Union Filed Charges Within the Statutory Limitations Period*

1. Introduction

Section 10(b) of the Act provides in pertinent part that, ''no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.'' The purpose of this provision is ''to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere . . . recollections of the events in question have become confused,' . . . and to stabilize existing bargaining relationships.'' *Machinists Local 1424 v. NLRB*, 362 U.S. 44 at 419 (1960).

The Union first filed charges against Respondent on January 20, 1988. Therefore, only unfair labor practices committed prior to July 20, 1987, are barred under Section 10(b). Respondent argues that the Union had facts which did or should have put it on notice that US Can would not adopt the master agreement or bargain on a multiplant basis before July 20 causing its charge to be untimely.[35]

The Respondent further submits that in determining whether a charge was timely filed, the 10(b) period begins to run when the charging party receives unequivocal notice of a decision alleged to be an unfair labor practice, not the date on which the decision is implemented or when its consequences ''become most painful.'' *Postal Service Marina Center*, 271 NLRB 397, 399–400 (1984). Recent cases indicate, however, that the 10(b) standard employed in *Postal Service* applies to discriminatory discharge cases but not to situations like those at issue here. See, e.g., *Esmark Inc. v. NLRB*, 887 F.2d 739, 746 (7th Cir. 1989), where the court of appeals agreed with the Board that the 10(b) period ran from the time an em-

[33] Respondent's claim that this allegation is untimely is treated in a subsequent section of this decision.

[34] The evidence shows that in 1987, several employees transferred to the Passaic plant from another Continental facility which was not involved in the acquisition. This suggests that some employees might have taken advantage of IPJO transfers had that option been available when the Passaic facility closed.

[35] Having decided that the issue of Respondent's obligations as a continuing employer by virtue of the stock transfer need not be reached, it follows that the question of the charge's timeliness with respect to this matter also need not be resolved.

ployer actually closed two plants as part of a scheme to evade a master agreement, not when the decision to close at some uncertain future date was announced. See also *Howard Electrical & Mechanical*, 293 NLRB 472 (1989).

2. Refusal-to-bargain charges based on contract adoption were timely

The parties differ radically as to the date on which the Union received unequivocal notice that Respondent would not bargain with the Union as the representative of a multiplant unit. According to the General Counsel and the Union, and as alleged in the complaint, having adopted the master agreement by a course of conduct, Respondent's wrongful act leading to the refusal-to-bargain charge occurred on August 20 when Respondent insisted to impasse on bargaining on a single plant basis.

From the Respondent's perspective, if any adoption occurred, it was on May 13, 1987, the date on which it executed the acquisition agreement containing a commitment to retain the terms and conditions of employment guaranteed in the master agreement. Thereafter, the Union had unequivocal notice at the May 26 meeting and again a July 14 telephone call between Brock and Lynch that US Can would not adopt the master agreement or bargain with respect to a multiplant unit. Relying on *Chambersburg County Markets*, 293 NLRB 387 (1989), Respondent argues that the alleged wrongful act—its repudiation of the master—occurred on these dates. Ergo, the Union's charge, filed more than 6 months later on January 20, 1988, was time barred.

Respondent's heavy reliance on *Chambersburg* calls for careful analysis of that case and its progeny. The relevant facts in *Chambersburg* are as follows: on November 11, 1985, after the parties had agreed on all terms for a collective-bargaining agreement, the employer revoked its earlier consent to the inclusion of a union-security clause. Thereafter, the employer refused the union's requests to sign the agreement made on various dates, the latest being January 22, 1986. Six months later, on July 22, the Union filed an unfair labor practice charge. Overturning a body of case law which held that each refusal to execute a contract was a continuing violation, the Board ruled that ''a charge alleging an unlawful refusal to execute a bargaining contract is cognizable only when filed within 6 months of the time at which the charging party is on notice of an initial refusal to execute.'' Id. at 388. However, the Board did not discard the continuing violation doctrine expressed in *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981), noting that it continued to be viable in cases involving breaches of periodic contractual obligations. Id. at fn. 6. The Board explained:

> Breaches of periodic contractual obligations fall within the first category of cases the Court defined in *Machinists Local 1424 v. NLRB, supra*, 362 U.S. at 416–417, which include occurrences within the 6-month limitation period that ''in and of themselves may constitute, as a substantive matter, unfair labor practices.'' Such breaches are not merely reiterations of an initial unlawful act, but are separate unlawful acts based on separate obligations.

In subsequent cases, the Board has applied the *Chambersburg* doctrine in varying contexts. For example, in *Chemung Contracting Corp.*, 291 NLRB 773 (1988), the Board held that where the parties' collective-bargaining agreement had expired on April 2, 1982, and where the Union knew of the employer's failure to make payments to various funds by the end of 1982, a charge filed on October 24, 1983, alleging a unilateral change in the terms and conditions of employment was untimely. In reaching this conclusion, the Board observed that ''the General Counsel can rely on evidence outside the 10(b) period as 'background,' but . . . is barred from bringing any complaint in which the operative events establishing the violations occurred more than 6 months before the unfair labor practice charge has been filed and served.'' Accord: *American Commercial Lines*, 291 NLRB 1066 (1988). Cf. *Twin Cities Electric*, 296 NLRB 1014 fn. 4 (1989) (charge filed almost a year after employer's midterm repudiation of its contract not time barred since ''each failure to comply with an agreement is a separate and distinct violation.''[36]

Accordingly, because the Union knew that the employer had unequivocally repudiated its obligation to make contributions to the trust fund and had not engaged in any conduct inconsistent with its initial actions, the Board found in *Chemug* that the operative facts establishing the violation occurred outside the 10(b) period. In so ruling, the Board made it abundantly clear that ''A key to the *Farmingdale* separate violation holding is that the charge addressed a failure to make benefit payments while the contract was still running.'' Id.

Similarly, in *Black Diamond Coal Mining Co.*, 298 NLRB 775 (1990), following the expiration of the labor contract, the employer gave the union unequivocal notice in February 1988 that it would not abide by the parties' grievance-arbitration procedures. The Board found that in the absence of any conduct or intervening circumstances that could be construed as inconsistent with the respondent's initial action, the charge filed on February 28, 1989, was outside the 10(b) period.

On considering the facts in the instant case in light of the foregoing precedents, I am persuaded that Respondent incorrectly relied on *Chambersburg*. The fallacy in Respondent's argument lies in its premise that any adoption of the master agreement occurred, if at all, as a single, discrete act on May 13, 1987, and that after repudiating the agreement on May 26, the master was defunct with no continuing vitality. In fact, notwithstanding its pronouncements of repudiation, Respondent assumed the agreement on a day-to-day basis until it expired in February 1989. Therefore, except as background, it is unnecessary to rely on Respondent's initial acts in May 1987 as evidence of unlawful conduct, for by a continuous course of conduct, it readopted and revived the master agreement throughout and well beyond the 10(b) period. Consequently, by adhering to the most significant aspects of the contract throughout its term, Respondent engaged in conduct which ''can be construed as inconsistent'' with its professed rejection. *Black Diamond Coal*, supra.

[36] The Board also relied on the fact that the 10(b) defense was not raised and, therefore, was waived. *Twin Cities*, supra.

Respondent's ongoing implementation of the master agreement constitutes a crucial difference between the circumstances in this case and those in *Chambersburg*.

As a result of Respondent's continued adherence to the master agreement, it continued to survive. Therefore, contrary to Respondent's contention, its initial repudiation of the master agreement in May cannot be equated with the employer's refusal to execute a contract in *Chambersburg*. In that case, the circumstances that created the obligation and gave notice to the union of a breach were completed more than 6 months before the charge was filed. Subsequent refusals were mere reiterations of the initial wrongful act. Here, Respondent's implementation of the master was uninterrupted. Its adherence to the collective-bargaining agreement throughout the 10(b) period and beyond was inconsistent with and overrode its purported repudiation. Such conduct gave rise to a continuing obligation to bargain with the Union on request. *Chemug Contracting*, supra.

Accordingly, Respondent was not at liberty on August 20 to refuse to bargain with the Union or to declare that impasse was reached over a permissive subject of bargaining during the life of the outstanding agreement. Its unequivocal refusal on that date to recognize or bargain with the Union as the designated representative of an appropriate multiplant unit violated the Act within the meaning of *Bryan* and *Farmingdale*. It follows that the Union's charge filed 5 months later was not time barred by Section 10(b).

3. Refusal-to-bargain charge under *White-Westinghouse* doctrine was timely

The rule in *Chambersburg* was narrowly drawn and does not appear to reverse longstanding precedent holding that where the duty to bargain in an appropriate unit is a continuing obligation, each refusal to do so violates the Act. See, e.g., *West Penn Power Co*., 143 NLRB 1316 (1963), enfd. denied on other grounds 337 F.2d 993 (3d Cir. 1964).

Here, under the *Burns* exception, Respondent, as a successor who retained the predecessor's work force, was required to bargain before changing any of the preexisting terms and conditions of employment. Therefore, each refusal to bargain with the Union as the representative of a multiplant unit constituted a separate and independent violation of the Act. See *Resthaven Nursing Home*, 293 NLRB 617 (1989), a case issued just 4 days before *Chambersburg*, where the Board held that the duty to bargain collectively is a continuing obligation so that each refusal by the employer to bargain with or provide information to a newly certified union was unlawful.

Respondent submits that it fulfilled any duty it may have had by bargaining to impasse on May 26, but if the message sent to the Union on that date was not enough then, it certainly gave unequivocal notice that it would not yield on these matters on July 14. As proof that the parties were deadlocked at the May 26 meeting, Respondent relies on Brock's statement to Lynch that the Company did not intend to bargain on a single plant basis and Lynch's equally adamant response that the Company had to accept the master agreement or negotiate a new multiplant contract. I am unconvinced that the parties' exchanges on either of these occasions resulted in a legally cognizable impasse.

The May 26 meeting was the first date on which the parties engaged in any dialog that resembled collective bargaining. I know of no case, including those cited by the Respondent, which hold that an impasse is properly declared after just one meeting. This is particularly true here since the parties took a somewhat conciliatory posture toward the meeting's end. Thus, although Lynch insisted on multiplant bargaining during the meeting, as it drew to a close, he offered to evaluate the excerpted portion of the acquisition agreement that affected the employees' interests and return with comments. Significantly, Respondent's counsel remarked that the meeting was a preliminary one, suggested that they not draw lines and proposed they talk further about the issues. These comments suggest that both parties anticipated further negotiations. On these facts, it would be premature to conclude that Respondent had given unequivocal notice of an inalterable bargaining position or that the parties had ''exhausted the prospect of concluding an agreement'' at the May 26 meeting. *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968). Rather, as Lynch testified, he left the meeting assuming that Respondent simply was taking a hard line in outlining its initial bargaining proposals. His June 1 letter to Stulman wherein he stated that ''Mr. Brock is taking the position that US Can Co. will not adopt the Master Agreement nor . . . even agree to one contract covering the four units'' is consistent with his testimony that in his view, Brock was staking out the Respondent's opening position and that further movement was possible.

The July 14 telephone conversation between Brock and Lynch hardly qualifies as a bargaining meeting. Neither man deviated from his previously stated position as to single plant bargaining; both expressed their points of view vigorously. At this point, each spokesman, knowing that the other was an experienced negotiator, could assume that they either had reached an insuperable obstacle to reaching agreement or were engaging in a consummate bargaining ploy. Nevertheless, Brock assured Lynch that he was not refusing to bargain and wished to continue negotiations. They then agreed to meet again and set aside several dates. Even assuming, arguendo, that were deadlocked on July 14, their willingness to engage in further discussion gave rise to the possibility that further movement could occur. See *Richmond Recording Corp*., 280 NLRB 615 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). Since they had met formally only once before, both Lynch and Brock still could harbor some hope that the other side would ''make *some* reasonable effort in *some* direction to compose their differences.'' *NLRB v. Reed & Price Mfg. Co*., 205 F.2d 131, 134–135 (1st Cir. 1953), cert. denied 346 U.S. 887.

Not until the August 20 negotiating session did Respondent unequivocally declare that impasse had been reached on the multiplant unit issue. Brock's statement that the Union could take whatever economic action it deemed necessary was pointed shorthand for saying that even if the Union struck, the Respondent would not yield. Clearly, at this juncture, ''there was not realistic possibility that continuation of discussion at that time would have been fruitful.'' *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Unlike prior bargaining meetings, Respondent offered no hope that its bargaining posture on the multiplant unit would change. Thus, Brock's words at this meeting constituted the final and unequivocal notice referred to in *Esmark* and *Postal Service* sufficient to trigger the start of the limitations pe-

riod.[37] Since, as discussed above, the scope of the unit is a permissive subject of bargaining, Respondent committed an unfair labor practice only when it insisted to impasse on single plant bargaining on August 20. Accordingly, the Union's charge filed 6 months later came within the 10(b) period.

4. Charge alleging unlawful abandonment of IPJO was not time barred

Respondent submits that the third amended charge filed on October 4, 1988, was time barred since the Company notified the Union more than a year before the date that it would not adhere to IPJO. The General Counsel and the Charging Party counter that the otherwise untimely allegation regarding the abandonment of IPJO was preserved under the Board's ''closely related'' doctrine.

In *Redd-I, Inc*., 290 NLRB 1115 (1988), a case of recent vintage, the Board reaffirmed a well-established doctrine that complaint allegations outside the 6-month 10(b) period are allowed if they are closely related to the allegations of a timely filed charge. In deciding whether the complaint amendments are closely related, the Board rued that it will examine ''whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge . . . arise from the same factual situation or sequence of events as the allegations in the pending timely charge . . . [and] whether a respondent would raise the same or similar defenses to both allegations.'' Id. at 1118.

On applying *Redd-I*'s tests here, I conclude that the Union's third amended charge was closely related to the original timely charge. The charge involved a unilateral alteration of a term of employment that gave rise to an alleged violation of Section 8(a)(5), the same section of the Act involved in the balance of the complaint. Moreover, the charge was closely tied to the theory underlying the entire case; that is, that Respondent unlawfully refused to abide by the master agreement. There can be no doubt that the charge drew upon much the same sequence of events as gave rise to the first charge and that the Respondent would, and did, raise the same defenses to both allegations. Thus, the second and third prongs of the ''closely-related'' standard were satisfied here as well.

The Respondent argues that the closely related test does not apply here because the Union knew of the alleged wrongful conduct as early as May 22 and 26, more than 6 months prior to the date the first charge was filed. Some dispute exists about whether Crisp said anything about IPJO at the May 22 meeting, and whether the Respondent made it clear which plants would be affected by its repudiation of IPJO. Apart from these imperfections, which cast doubt on whether Respondent's early references to IPJO were unambiguous, there is another more serious defect in its 10(b) argument. At best, all that the Company communicated to the Union at the May 22 and 26 meetings was a future intent to repudiate IPJO. Such anticipatory pronuncements do not constitute the actual implementation of an unlawful act which is required to trigger the 10(b) period. See *Esmark*, supra, 608 F.2d at 746; *Howard Electrical & Mechanical*, supra.

The earliest occasion on which Respondent refused to apply IPJO to a concrete situation came in December 1987 when the clearing plant manager advised the local union president that he would not consider filling positions of summer employees with unit members from an IPJO list. This incident occurred well within the 6-month period preceding the initial charge filed on January 20, 1988. Therefore, the third amended charge, which related back to a charge which was timely filed, is not time barred.

CONCLUSIONS OF LAW

1. United States Can Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Employees in the following units at the plants named below constitute an appropriate multiplant unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

5 Clearing, Local 2374 (Chicago, Illinois)

Includes all production and maintenance employees but excludes all foremen and assistant foremen, office and factory clerical employees (except checkers), watchmen, nurses, draftsmen, chemists, laboratory technicians, outside truck drivers and supervisory employees as defined in the Labor Management Relations Act.

30 Passaic, Local 4580 (New Jersey)

Includes all production, maintenance and shipping employees and quality control inspectors, but excludes all timekeepers, outside chauffeurs, watchmen, cafeteria employees, lithograph department employees, office technical employees, guards, professional employees and supervisors as defined in the Act.

64 North-Grand, Local 2645 (Chicago, Illinois)

Includes all production and maintenance employees including employees of the Solder House, janitor, matrons, inspectors and checkers and working supervisors, but excludes office and factory clerical employees, watchmen, timekeepers, nurses, draftsmen, chemists, laboratory technicians, storekeepers, outside full time inspectors at customers' plants, outside truck drivers, full time cafeteria employees, cement workers, employees covered by other bargaining units in the plant, foremen, assistant foremen and all other supervisory employees as defined in the Act.

476 Derry, Local 9123 (New Hampshire)

Includes all full-time and regular part-time production and maintenance employees employed by the employer at its Derry Industrial Park, Derry, New Hampshire facility, including all electricians, assembly maintainers, press mainteainers, warehouse employees, inspectors, fork truck operators, feeders, press operators, operators and machine cleaners, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

[37] See also *Goldin-Feldman, Inc*., 295 NLRB 359 fn. 3 (1989).

460 Burns Harber, Local 8445 (Indiana)

Includes all hourly production and maintenance employees, but excludes supervisory personnel, clerical employees, lithograph pressmen and feeders and their apprentices, and all other professional employees as defined by law.

4. At all times since May 13, 1989, the Union, on behalf of and in conjunction with its locals described in paragraph 3 above, has been the representative for the purpose of collective bargaining by virtue of Section 9(a) of the Act with respect to rates of pay, wages, hours, and other terms and conditions of employment.[38]

5. By refusing to bargain with the Union in the above-described appropriate multiplant unit since August 20, 1987, Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to be bound by the terms of the master agreement with respect to a multiplant unit and by unilaterally altering the terms of the agreement regarding the Inter-Plant Job Opportunity Program, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. Specifically, I shall recommend that Respondent bargain in good faith with the Union on a multiplant basis with respect to the unit set forth above and, if an understanding is reached, embody it in a signed agreement. Further, I also shall recommend that Respondent rescind its discontinuance of the IPJO provision of the now expired master agreement and take whatever actions may be necessary to apply the terms of that provision to eligible IPJO applicants. Lastly, the Respondent shall be ordered to refrain from interfering with, restraining, or coercing employees in the exercise of Section 7 rights in any like or related manner, and to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, United States Can Co., Oak Brook, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the United Steelworkers of America, AFL–CIO–CLC as the exclusive bargaining representative of its employees in the appropriate multiplant unit described above in paragraph 3 of the Conclusions of Law section of this decision.

(b) Unilaterally altering the terms and conditions of employment of the employees in the above-described unit by discontinuing the Inter-Plant Opportunity Program set forth in article 29 the the master agreement which expired in February 1989.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of employees in the above-described multiplant unit.

(b) Rescind the unilateral discontinuance of IPJO and take actions consistent with the terms set forth in article 29 of the 1986–1989 master agreement to apply that program to eligible applicants.

(c) Post at its plants in Derry, New Hampshire and Burns Harbor, Indiana, copies of the attached notice marked ''Appendix.''[40] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[38] This does not preclude bargaining in the individual plant units for local supplements in accordance with past practice.

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''